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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT MICHAEL HANAHAN,
Petitioner,

v.

DENNIS M. LUTHER, Warden,
and WILLIAM PILCHER, Chief Probation Officer,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD F. WALSH, ESQ.
53 W. Jackson Blvd.
Suite 1220
Chicago, Illinois 60604
(312) 427-6050
Attorney for Robert Michael Hanahan

Pandick Press Midwest, Inc., Chicago • 454-7600

QUESTION PRESENTED

Upon a petition for a writ of habeas corpus what is the correct standard for reviewing the sufficiency of the evidence relied upon by the United States Parole Commission in finding that a parolee has violated his parole.

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Petitioner, by his attorney, petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit affirming the denial of his petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is not reported pursuant to Circuit

Rule 35. It is reproduced in the Appendix. The opinion of the district court is not reported. It is reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 27, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

Pursuant to Supreme Court Rule 2.1(f) the following constitutional provisions, rules, and statutes are set forth in the appendix:

Title 18 United States Code § 4206(a)
Title 18 United States Code § 4214(d)
Title 28 United States Code § 2241
United States Constitution, Fifth Amendment

STATEMENT

On December 3, 1979, the Petitioner, who was on federal parole, was arrested by Chicago Police Officers, and was charged, in the Circuit Court of Cook County, Illinois, with possession of firearms and possession of a stolen motor vehicle.[1] On December 14, 1979, the United States Parole Commission issued its warrant for Petitioner's arrest and charged him with four grounds to violate his parole: association with known criminals; unlawful possession of firearms; possession of a stolen motor vehicle; and conspiracy to commit savings and

[1] On December 4, 1979, a finding of a no probable cause was made on the firearms charge and in March, 1980, Petitioner was found not guilty of the possession of a stolen motor vehicle charge.

loan robbery. Petitioner surrendered to the United States Marshal and was granted bail by the district court on December 26, 1979.

On January 8, 1980, Petitioner's counsel had a conference with the United States Probation Officer who advised that the Commission was going to consolidate his preliminary hearing and his final hearing because the petitioner was going to request the presence of adverse witnesses and the Commission would only call witnesses once. The Probation Officer further advised that the Commission had instructed her not to show any documents to Petitioner's attorney. On January 9, 1980, the Petitioner demanded a preliminary hearing with adverse witnesses; requusted a copy of the police reports; and requested a subpoena for an additional witness.

On January 11, 1980, Petitioner was instructed that a request under the Privacy Act had to be filed to review appellant's file. Such a request was filed on January 21, 1980. On February 6, 1980, the Commission responded but refused to produce any document concerning the December 3, 1979, arrest on the grounds that disclosure would be harmful to someone.[2]

On April 29, 1980, Petitioner had a hearing before two hearing examiners of the Commission. Petitioner objected to proceeding because no adverse witnesses were present and the witness that Petitioner requested be subpoenaed had not been subpoenaed. One of the examiners read two short conclusory paragraphs from a Chicago Police report but would not allow Petitioner's attorney to see the multipage report. The Petitioner testified that, on December 3, 1979, he had worked at his employment as a carpenter and, after work, he borrowed the 1977 Ford van from Maxine Shipp in order to pick up a case of fruit from Mr. Paul Panzcko. Mr. Panzcko was in the business

[2] The police reports were submitted to the district court in camera as G. Exs. 1 & 2 and have never been disclosed to Petitioner.

of selling produce which he bought at wholesale. The Petitioner had purchased produce from Mr. Panczko on three or four other occasions.

Petitioner met with Mr. Panczko in a restaurant located approximately four blocks from Petitioner's home. Mr. Panczko had Mr. Siegal, Mr. Tomasek, and Mr. Pullia and him. While all three persons were known to Petitioner, he did not know they were going to be there. Petitioner gave Mr. Panczko, Mr. Siegal and Mr. Pullia a ride to Panczko's Cadillac which was parked in the parking lot of a large office complex about a block from the restaurant. Mr. Tomasek followed in his own car.

Petitioner testified that when they arrived in the parking lot, he parked next to the Cadillac and they all got out and had a conversation near the front of the van. Mr. Panczko left the group and went to the trunk of the Cadillac. When he returned, Mr. Panczko, Mr. Siegal, and Mr. Pullia got into the Cadillac. All three vehicles left the lot. When they got to a stop sign at a frontage road, an unmarked car attempted to stop them. Petitioner fled because he was on federal parole but he was apprehended.

On May 12, 1980, the Commission advised that it was going to find that Petitioner violated his parole on the charge of possession of firearms and on the charge of association with a known felon.

After being advised that a new hearing was going to be ordered with adverse witnesses, Petitioner, on May 27, 1980, again requested a subpoena for Maxine Shipp. In addition, Petitioner requested a subpoena for the records of United Fruit Auction Sales, Inc. These requests for subpoenas were denied on the ground that affidavits could be procured.

On August 18, 1980, a second hearing was held. Sargent David Welch and Investigator Dennis Farina for the Chicago Police Department testified as adverse witnesses. The officers

testified to how they began surveillance of Mr. Panczko, Mr. Pullia and Mr. Siegal at about 3:00 P.M. on December 3, 1980. Mr. Panczko drove to a parking lot of an office complex and the three individuals got out of Mr. Panczko's Cadillac and left the area. The Police maintained surveillance on the Cadillac and at approximately 6:30 P.M. a 1977 Ford van driven by Petitioner and a Chevrolet driven by Mr. Tomasek entered the lot and parked on the left side of the Cadillac. Mr. Pullia, Mr. Siegal, Mr. Panczko and Petitioner got out of the van and had a conversation with Mr. Tomasek at the front passenger side of the van. Mr. Panczko left the group and went to the trunk of the Chevrolet and took a shopping bag out. He placed the bag into the side door of the van. Officer Farina observed a crow bar protruding from the bag. Mr. Panczko, Mr. Pullia and Mr. Siegal got into the Cadillac and all the vehicles left the parking lot. The police decided to stop the vehicles and to question the occupants. When the police attempted to stop the vehicles, Petitioner fled pursued by Sgt. Welch who apprehended Petitioner.

After arresting Petitioner, Sgt. Welch searched the van. In the well of the side door, he found the paper bag which contained two handguns and some plastic face masks. A crow bar was in the well of the door and a third hand gun was found loose on the floor of the back of the van.

On September 10, 1980, the hearing examiners found that Petitioner had violated his parole on four charges. The decision stated that the decision on the charge of unauthorized association with known criminals was based on a probation officer's letter of December 10, 1979, the December 5, 1979, police reports, and the testimony of the officers. The decision on the charge of unauthorized possession of firearms was based on the probation officer's letter, the December 5, 1979 police reports and the testimony of Sgt. Welch. The Regional Commissioner affirmed the decision on October 16, 1980. The National Appeals Board affirmed on two charges on January 28, 1981.

The district court after examination of the documents submitted, denied Petitioner's Petition for a Writ of Habeas Corpus filed pursuant to 28 U. S. C. § 2241. In doing so, the district court held that the proper standard for reviewing a decision of the Parole Commission is not whether the decision was supported by a preponderance of the evidence but whether there is a rational basis for the conclusions of the Commission.

The United States Court of Appeals for the Seventh Circuit affirmed this decision and adopted the rational basis test as the standard for reviewing a parole revocation decision of the United States Parole Commission.

REASONS FOR GRANTING THE WRIT

THE DECISION HELD BELOW CONFLICTS WITH THE STATUTORY BURDEN OF PROOF ESTABLISHED BY CONGRESS AND WITH THE PRIOR DECISION OF THIS COURT.

The decision below held that the sufficiency of the evidence to support a finding that a parolee has violated a condition of his parole is not reviewable upon a petition for a writ of habeas corpus. The decision held that the only issue is whether there is a rational basis in the record for the Commission's decision. In reaching this conclusion, the decision relies upon *Luther* v. *Molina*, 627 F. 2d 71 (7th Cir. 1981); *Zannio* v. *Arnold*, 531 F. 2d 687 (3d Cir. 1976); and *DeFillio* v. *Fitzpatrick*, 378 F. 2d 85 (2d Cir. 1967). In each of these cases the issue was the proper standard for reviewing the totally discretionary decisions of the Commission in granting parole or release pending a revocation proceeding.

The Act creating the United States Parole Commission grants the Commission wide discretion in granting parole, 18 U.S.C. § 4206(a). However, this same act limits this discretion in revoking parole to those situations where it has been proven by a preponderence of the evidence that a parole violation has

occurred, 18 U.S.C. § 4214(d). The legislative history clearly indicates the Congress considered this Court's decision, in *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972), to the effect that a parolee has a valued interest in his parole and Congress established that this valued interest should not be taken away unless there is sufficient evidence by a preponderance of the evidence to prove the parolee violated the conditions of his parole. *Parole and Reorganization Act*, 1976 U.S. Code Congressional and Administrative News, pg. 367.

This Court's decision in *Jackson* v. *Virginia*, 443 U.S. 301 (1979) and *Woodby* v. *INS*, 385 U.S. 276 (1966) are in conflict with the decision below for these decisions hold that the proper standard of review on a petition for a writ of habeas corpus, in this instance, is whether a rational trier of fact could have found the essential elements of the violation by a preponderance of the evidence.

The essential elements could not be proven in this instance. 28 C.F.R. § 2.20 provides that a parole violation based on new criminal conduct shall be based upon applicable state or federal law. Here, the charge of unauthorized possession of firearms could have been based upon 18 U.S.C. § 922(g), 18 U.S.C. App. § 1202, or Ill. Rev. Stat. Ch. 38, § 24-1. Each of these statutes, at a minimum, requires a finding of knowledge as an essential element. Here, no rational trier of fact could find that Petitioner knew another individual had placed firearms in his van.

The decision below recognizes that the Commission has discretion in parole violation cases which Congress never meant for it to have and which concepts of due process prohibit the Commission from acquiring. The decision below by limiting review of the sufficiency of the evidence in habeas corpus actions from decisions of the Commission revoking parole precludes the parolee from having the sufficiency of the evidence against him reviewed by the courts.

CONCLUSION

For the foregoing reasons, this Court ought to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment in the instant case.

Respectfully submitted,

RICHARD F. WALSH, ESQ.
53 W. Jackson Blvd.
Suite 1220
Chicago, Illinois 60604
(312) 427-6050
Attorney for Robert Michael Hanahan

September, 1982